

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
CHARLESTON DIVISION**

**B.P.J., by her next friend and mother, HEATHER JACKSON,**

**Plaintiff,**

**v.**

**Civil Action No. 2:21-cv-00316  
Honorable Joseph R. Goodwin**

**WEST VIRGINIA STATE BOARD OF  
EDUCATION, HARRISON COUNTY BOARD  
OF EDUCATION, WEST VIRGINIA  
SECONDARY SCHOOL ACTIVITIES  
COMMISSION, W. CLAYTON BURCH in his  
official capacity as State Superintendent,  
DORA STUTLER, in her official capacity as  
Harrison County Superintendent, and  
THE STATE OF WEST VIRGINIA,**

**Defendants,**

**and**

**LAINY ARMISTEAD,**

**Defendant-Intervenor.**

**DEFENDANTS WEST VIRGINIA STATE BOARD OF EDUCATION  
AND W. CLAYTON BURCH'S RESPONSE IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

**NOW COME** Defendants West Virginia State Board of Education and Superintendent W. Clayton Burch (collectively hereinafter "WVBOE Defendants"), by and through counsel, Kelly C. Morgan, Michael W. Taylor, Kristen V. Hammond, and the law firm of Bailey & Wyant, P.L.L.C., and for their response in opposition of Plaintiff's Motion for Summary Judgment hereby state as follows:

**I. INCORPORATION OF MOTION FOR SUMMARY JUDGMENT**

WVBOE Defendants filed their Motion for Summary Judgment on April 21, 2022. [ECF

Nos. 283 & 284]. In lieu of reiterating substantially the same facts as stated therein, WVBOE Defendants incorporate by reference those facts as if fully stated herein. Further, as addressed below, the legal arguments in WVBOE Defendants' Motion for Summary Judgment directly address the sole contention against them in Plaintiff's Motion for Summary Judgment which is that injunctive relief is proper against them. Therefore, WVBOE Defendants incorporate by reference those legal arguments asserted in their Motion for Summary Judgment as if fully stated herein.

## II. STANDARD OF REVIEW

"Summary judgment is proper where the pleadings, depositions, and affidavits in the record show that there is 'no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Kitchen v. Summers Continuous Care Center, LLC*, 552 F.Supp.2d 589, 592 (S.D. W. Va. 2008) (quoting *Fed.R.Civ.P.* 56(c)). "The moving party bears the burden of showing that there is no genuine issue of material fact, and that it is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d. 265 (1986). "When determining whether there is an issue for trial, the Court must view all evidence in the light most favorable to the non-moving party." *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 123 (4th Cir.1990). Although the Court views all underlying facts and inferences in the light most favorable to the nonmoving party, "[t]he nonmoving party nonetheless must offer some 'concrete evidence from which a reasonable juror could return a verdict in his [or her] favor[.]'" *Piedmont Behavioral Health Ctr., LLC v. Stewart*, 413 F.Supp.2d 746, 751 (S.D. W. Va. 2006) (Goodwin, J.) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). "Conclusory or speculative allegations do not suffice, nor does a mere scintilla of evidence in support of [the non-moving party's] case." *Thompson v. Potomac Elec. Power Co.*,

312 F.3d 645, 649 (4th Cir. 2002).

### III. LAW AND ARGUMENT

#### A. INJUNCTIVE RELIEF IS IMPROPER AGAINST WVBOE DEFENDANTS.

Plaintiff's Motion for Summary Judgment asserts that injunctive relief is proper against all Defendants, including WVBOE Defendants. [ECF No. 291, at 12-13]. Specifically, as it relates to WVBOE Defendants, Plaintiff asserts that an injunction is proper against WVBOE Defendants because "[WVBOE Defendants] have acknowledged that, '[a]bsent an injunction by a court,' the State Board and Superintendent Burch 'would be compelled and required to follow H.B. 3293' and the State Board 'would be compelled and required to promulgate rules implementing H.B. 3293.'" [Id., at 13].<sup>1</sup> However, this mere conclusory statement does not meet the required elements of Plaintiff's claims against WVBOE Defendants, as fully briefed in WVBOE Defendants' Motion for Summary Judgment and fully incorporated by reference herein. [ECF Nos. 283 & 284].

More specifically, WVBOE Defendants have a duty to follow the law, just as every other person or entity. But, while WVBOE Defendants have a duty to follow the law, merely following the law by WVBOE Defendants does not "cause" the complained of injuries by Plaintiff. As set forth in WVBOE Defendants' Motion for Summary Judgment, causation is an essential element of standing and the causes of action asserted by Plaintiff against WVBOE Defendants. [ECF No. 284].

Since WVBOE Defendants fully addressed the legal arguments on Plaintiff's lack of causation in their Motion for Summary Judgment, and Plaintiff does not address it in her Motion for Summary

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<sup>1</sup> WVBOE Defendants object to Plaintiff's Statement of Undisputed Material Facts relied upon in support of her Motion for Summary Judgment as the parties have not agreed that the "facts" therein are material or undisputed. [ECF No. 290]. Plaintiff's Statement of Undisputed Material Facts consists of factual assertions which include general background information, matters in dispute, arguments, legal conclusions, conjecture, and other information not material to this case. [Id.].

Judgment, WVBOE Defendants incorporate by reference those legal arguments in response to Plaintiff's Motion for Summary Judgment, as if fully stated herein.

Having addressed the issue on WVBOE Defendants having a duty to follow the law, the only issue that remains is that the State Board of Education is required to promulgate rules regarding the enforcement of H.B. 3293. While non-existent rules certainly cannot "cause" an injury, as set forth in WVBOE Defendants' Motion for Summary Judgment, there is an additional argument regarding legislative immunity with respect to promulgation of rules. [ECF No. 284]. As WVBOE Defendants briefed the arguments regarding legislative immunity in their Motion for Summary Judgment, and Plaintiff does not address it in her Motion for Summary Judgment, WVBOE Defendants incorporate by reference those arguments in response to Plaintiff's Motion for Summary Judgment as if fully stated herein.

**WHEREFORE**, based upon the foregoing, Defendants West Virginia State Board of Education and Superintendent W. Clayton Burch respectfully request that this Court enter an Order denying Plaintiff's Motion for Summary Judgment as to all claims asserted against them and awarding them such other relief deemed necessary and appropriate.

**Respectfully Submitted,**

**DEFENDANTS WEST VIRGINIA  
STATE BOARD OF EDUCATION  
and W. CLAYTON BURCH**

**By Counsel,**

**/s/ Kelly C. Morgan**

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THE STATE OF WEST VIRGINIA,**

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**and**

**LAINY ARMISTEAD,**

**Defendant-Intervenor.**

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on May 12, 2022, the foregoing “**Defendants West Virginia State Board of Education and Superintendent W. Clayton Burch’s Response in Opposition to Plaintiff’s Motion for Summary Judgment**” was electronically filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants:

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